In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1171

VILAKETI BLOOMFIELD, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. i–vi) is reported at 404 F.2d 656.

JURISDICTION

The judgment of the court of appeals was entered on December 19, 1968. The petition for a writ of certiorari was filed on March 19, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner, an alien from outside the Western Hemisphere, was properly held not to be exempt from the requirement of obtaining a certificate from

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the Secretary of Labor as a prerequisite to seeking adjustment of his status to that of a permanent resident.

STATEMENT

Petitioner, a citizen of Tonga, an island in the South Pacific, was admitted into the United States as a non-immigrant student on July 9, 1963, at Honolulu, Hawaii. His authorized stay was extended to July 8, 1965. He overstayed this date and failed to maintain his student status. Accordingly, deportation proceedings were commenced against him. At a hearing before a special inquiry officer petitioner conceded deportability and was granted the privilege of voluntary departure.

On March 10, 1965, prior to the institution of the deportation proceedings, petitioner had applied for adjustment of his status to that of a permanent resident pursuant to Section 245 of the Immigration and Nationality Act (8 U.S.C. 1255). This application was denied on January 3, 1966, by the district director on the ground that petitioner had failed to secure the employment certificate from the Secretary of Labor required by Section 212(a)(14), (8 U.S.C. 1182(a)(14)), as amended by Public Law 89–236, effective December 1, 1965 (see Pet. App. xv–xvi).[1] The same application was renewed by petitioner during the de-

[1] Under Section 212(a)(14), as amended, aliens seeking to enter the United States for the purpose of performing labor must obtain an employment certificate from the Secretary of Labor to the effect that qualified workers are not available at the place where the alien intends to work and that the alien's employment would not adversely affect wages and working conditions of domestic persons similarly employed. Aliens tem-

portation proceedings and was denied for the same reason by the special inquiry officer. On appeal to the Board of Immigration Appeals, petitioner argued that he was exempt from the provisions of Section 212(a)(14) by virtue of an amendment to Section 245 (the adjustment of status provision) on November 2, 1966, *viz.*, Public Law 89–732, 80 Stat. 1161 (see Pet. App. xvii). The Board determined that the 1966 amendment was intended to and did exempt only natives of Western Hemisphere countries and adjacent islands who had applied for permanent resident status prior to December 1, 1965. Accordingly, it upheld the denial of petitioner's application for permanent resident status (Pet. App. vii–ix). On petition for review under Section 106(a) (8 U.S.C. 1105a) the court of appeals affirmed on similar grounds (Pet. App. i–vi).

ARGUMENT

The court below correctly concluded that petitioner is not exempt from the requirement for clearance from the Secretary of Labor before qualifying for admission as a permanent resident. The question presented is of limited and diminishing importance, and there is no conflict among the circuits. Thus, further review is not warranted.

Section 212(a)(14)'s requirement for an employment certificate became effective on December 1, 1965. At the same time Congress provided that natives of

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porarily in the United States must, under Section 245, show that they are eligible for admission into the country for permanent residence in order to qualify for discretionary relief—adjustment of status—under that provision (see Pet. App. iii).

the Western Hemisphere were ineligible to have their status adjusted under Section 245 while they were physically present within the United States, in subsection (b) of Section 13 of the 1965 Act (79 Stat. 919), which added subsection (c) to Section 245 (see Pet. App. xvii).[2] This meant that all Western Hemisphere natives, even those whose applications for adjustment were already pending, would, in order to obtain permanent resident status, be required to leave the United States and apply for immigrant visas at some consular office abroad. To alleviate that hardship, Congress, in November 1966, enacted Public Law 89–732, the statute here at issue, which amended subsection (b) of Section 13 of the 1965 Act—*i.e.*, subsection (c) of Section 245—by adding the following provision (80 Stat. 1161):

> Nothing contained in subsection (b) of this section [Section 13 of the 1965 Act] shall be construed to affect the validity of any application for adjustment under section 245 filed with the Attorney General prior to December 1, 1965, which would have been valid on that date; but as to all such applications the statutes or parts of statutes repealed or amended by this Act are, unless otherwise specifically provided therein, continued in force and effect.

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[2] Congress found that many Western Hemisphere natives were entering as non-immigrants and were promptly applying for adjustment of status. See H. Rep. No. 745, 89th Cong., 1st Sess., p. 22; S. Rep. No. 748, 89th Cong., 1st Sess., p. 24.

As the court of appeals reasoned (Pet. (App. v–vi):

> The new subsection (c) which the 1966 Act adds to section 13 of the 1965 Act, begins with the words: "Nothing contained in *subsection* (*b*) of this section shall be construed to affect the validity of any application * * *. (Emphasis added.) It is therefore evident that, under this 1966 amendment, the only statutory provisions which were *not* to affect the validity of an application filed prior to December 1, 1965, were those which were contained in subsection (b) of Section 13 of the 1965 Act. Those statutory provisions operated only to exclude from the scope of section 245, aliens who are natives of any country of the Western Hemisphere or of any adjacent island—a provision inapplicable to petitioner.

In other words, Congress, having in the 1965 Act altered the provisions of Section 245 with respect to natives of the Western Hemisphere by depriving such aliens of the right to seek adjustment of status in the United States, softened the impact of that drastic change by providing in the 1966 amendment that the bar of the 1965 Act would not affect the validity of adjustment of status applications by Western Hemisphere natives which had been filed prior to December 1, 1965.[3] Contrary to petitioner's argument, the

[3] The Board of Immigration Appeals considers that the 1966 amendment had the effect of exempting Western Hemisphere natives from all post-December 1, 1965, statutory requirements

1966 amendment did not purport to relieve non-Western Hemisphere aliens of the requirement of obtaining an employment certificate from the Secretary of Labor pursuant to Section 212(a)(14). Neither its literal language, nor its background and legislative history, supports such a construction. The limited congressional purpose in enacting the 1966 amendment—which is apparent on the face of the provision itself—was explained in a conference report as follows (Conf. Rep. No. 2334 on H.R. 15183, reported in 3 U.S. Code, Cong. & Admin. News, 89th Cong., 2d Sess., p. 3802):

> Section 3 of the Senate amendment provides that any application for adjustment of status under section 245 of the Immigration and Nationality Act filed with the Attorney General prior to December 1, 1965, may be adjudicated *notwithstanding the provisions of section 245 (c) of the Immigration and Nationality Act.* This objective is identical with H.R. 12596, which was approved by the House of Representatives August 1, 1966. The language of the Senate amendment with respect to this provision is slightly different from the House version but accomplishes the same objective. The conferees agree to adopt the Senate provision. [Emphasis added.]

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rather than merely lifting the bar imposed on such aliens from seeking adjustment of their status under Section 245, so long as their application was filed before the December 1, 1965 date. See *Matter of Hoeft*, Int. Dec. 1723 (Sept. 27, 1966 and April 14, 1967), cited at Pet. App. ix. That construction is nonetheless not helpful to petitioner, who is concededly not a native of the Western Hemisphere.

It is thus clear that the 1966 amendment did not eliminate, as to non-Western Hemisphere aliens like petitioner, the requirement of an employment certificate from the Secretary of Labor. Since he lacked such clearance, his application for adjustment of status was properly denied.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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